REPUBLIC OF ALBANIA

THE ASSEMBLY

PARLIAMENTARY GROUP OF THE SOCIALIST MOVEMENT FOR INTEGRATION

Nr. _____ Prot. Tirana, on ____/____/2015

To: The *ad hoc* Committee of the Albanian Assembly on the Judiciary Reform

Subject: Review of the draft law "On some ammendments to the law No. 8417, dated 21.10.1998 "Consitution of the Republic of Albania", as amended".

Honourable colleagues,

With regard to the draft law proposed by you "On some amendments to law No. 8417, date 21.10.1998 "Constitution of the Republic of Albania" as amended, we present our opinion as follows:

1. Article 12 of the draft law, which stipulates that the *Constitutional Court may not declare as unconstitutional a law approved by the Assembly which amends the Constitution,* by manner of its phrasing, it restricts the decision making power of the Constitutional Court. In this respect, a possible phrasing could be "*The law adopted by the Assembly to amend the Constitution, cannot be subject to adjudication by the Constitutional Court."*

2. Regarding article 2 of the draft law, which provides that *"the Republic of Albania participates in the European Union [...],"* the terminology used is inappropriate. The term referring to countries that wish to join the European Union is "accession".

3. In relation to article 5 of the draft law, which makes an addition to article 39, paragraph 2 of the Constitution, reading specifically "*and when contained in the legislation of the European Union,"* we wish to draw your attention to the fact that such wording is not necessarily important. Actually, extradition is regulated not only by the domestic legislation, but also by bilateral and/or multilateral agreements to which the Republic of Albania has acceded and ratified by law and are, therefore, fully applicable, including those with EU member countries. Notwithstanding the good faith in which this addition is made, once Albania gains EU membership, EU legislation will become readily applicable. We wish to further point out that upon gaining membership, the Republic of Albania will be subject to the EU legislation, hence such provision is redundant.

4. Article 43 of the Constitution, as rephrased by article 6 of the draft law, represents a case of inadequate wording, barely meeting the qualities for constitutional provisions. For instance, it is unclear under what circumstances this provision authorizes legislation to provide for appealing against a judicial ruling to a higher court: is it when the monetary value of the subject matter is small, or when the monetary value of the subject matter is big? Furthermore, should such a provision be contained in the constitution, particularly since article 43 falls under the chapter of *Individual Freedoms and Rights*?

5. Article 8 of the draft law, providing for the addition of article 80/1, reads: *The Council of Ministers reports to the Assembly on its decision-making in the context of Albania's participation in European Union institutions.* This provision is unclear in various respects:

a) What does "decisions made by Council of Ministers" mean? Does the phrase signify the decisions adopted by the Council of Ministers in the context of the *aquis* specifically, or does it apply to all the normative acts under article 118 of the Constitution?

b) In any case, shall reporting take place prior to, or following the adoption of such acts?

c) What shall be understood by "participation in European Union institutions"? Will this term refer to Albania's accession to the European Union?

d) What is the need of resolutions and conclusions by the Assembly? In any case, will the resolutions and conclusions relate to participation in European Union institutions, or to the decisions made by the Council of Ministers?

6. Article 9 of the draft law, provides for the addition of paragraph 3/1 under article 109 of the Constitution. The term "resident" used in this provision, is extraneous to and indefinite in domestic legislation.

7. With regard to articles 10 and 11 of the draft law, we wish to point out a number of issues:

a) Abrogation of paragraph 3 of article 122 is entirely unclear and unsubstantiated. This paragraph specifies that in case of conflict, acts adopted by an international organization shall prevail over domestic legislation whenever treaties for the accession of the Republic of Albania in that organization expressly provide for the direct implementation of acts adopted by the same.

In this case, we wish to bring to your attention that the term "international organization" used in this paragraph, does not refer solely to the European Union, but to an array of international organization to which Albania has already acceded. Thus, the term "international organization" refers to Albania's accession to the EU, as well as to a number of other organizations.

b) It is likewise unclear what happens in case the domestic law conflicts with the acts adopted by an international organization to which Albania has acceded. The addition of paragraph 2/1 does not address the issues mentioned above. Nor does it make room for the resolution of potential conflicts between domestic legislation and the acts to be made by the international organization in the future.

c) Lastly, the legislative technique used for the abrogation and addition of paragraphs is also erroneous. In this case, the amendment contained in paragraph 3 of article 122 could be effected in a single article of the draft law containing wording proposed to be added in paragraph 2/1.

d) With regard to the content of paragraph 2/1, i.e., *EU legislation prevails over Albania's domestic legislation,* we wish to draw your attention that such provision is not well thought and does not consider the fact that EU legislation is divided into *primary* legislation and *secondary* legislation.

Primary legislation refers to the treaties, which lay the foundations for the activity of the European Union, whereas secondary legislation is made up of regulations, directives and decisions. The objective set by the EU treaties can be attained through several various types of acts. Some of these acts are obligatory, and some not. Some of the acts are applicable to all member states and some others only to specific ones.

Therefore, the Constitution should not stipulate that EU legislation prevails over domestic legislation, regardless of the typology of EU legislation. *By way of illustration,* Regulations are compulsory for all member states, whereas Directives set objectives and leave it to the member states to work out the ways to achieve such objectives. Furthermore, Decisions are obligatory for the country they refer to. Recommendations and Opinions are not obligatory.

8. As concerns article 15 of the draft law, we note that the explanatory notes point out that the Analytical Document of the Justice System, among the problems, underlines the failure of the formula guiding the appointment of Constitutional Court judges, and the poor quality of the Constitutional Court deliberations.

However, article 15 of the draft law does not clarify the manner of appointment of these judges. Hence, does the new wording avoid current problems and if so, how?

The document also states that those members of the Constitutional Court who come from the judiciary are in a conflict of interest. However, article 125 of the Constitution, as rephrased,

stipulates that the judiciary can also appoint members to the constitutional court. Under these circumstances, does the proposal address the identified problems?

9. Articles 20, 25, 35, 38, 39 of the draft law do not amend any provisions of the Constitution and should therefore not be a part of the draft law.

10. With regard to article 21 of the draft law, which rephrases article 130 of the Constitution, we believe that the provision currently in force is clearer, since it states that *being a judge of the Constitutional Court is incompatible with all other governmental, political or private activities.* This principle should be upheld in article 36 of the draft law, which amends article 143 of the Constitution.

11. The reference made by the term "acts by public power" in article 22 of the draft law, amending paragraph "f" of current article 131, is unclear. The subject-matter jurisdiction of the Constitutional Court should be sufficiently defined. Moreover, even the instances specified by the provision as *acts by public power,* are subject to appeal initially in the lower instance courts, and then, following the exhaustion of all legal means and remedies available for the protection of infringed rights, it shall be the judicial decision in favor of the *acts by public power* which shall be brought before the Constitutional Court. In view of the above, the terminology used needs to be revisited.

12. In relation to article 23 of the draft law:

a) In terms of the legislative technique, the addition of a new paragraph in article 131, can be exhausted through article 22 of the draft law, which provides for amendments in article 131 of the Constitution. Hence, no need for a separate article.

b) As concerns the provision that the Constitutional Court rules over jurisdictional disputes, and subject matter and operation jurisdiction disputes between the Constitutional Court and the High Administrative Court, such a provision is not only redundant in view of the fact that the subject matter and operational jurisdiction for each of these two courts is specified by the

constitution, but it is also principally erroneous since as a rule, in case of conflict between two entities, a third party should adjudicate.

13. Article 26 of the draft law, paragraph 1, subparagraph "h", stipulates that the Constitutional Court may be set in motion by the *political parties and their organizations.* This paragraph should be reviewed to establish the nature of the error which, if not corrected, may leave out "other organizations".

14. In article 27 of the draft law, in paragraph 3 of article 135 of the Constitution, the term "by law" should be added after the word, "creates" to specify the act by which the Assembly may establish courts for specific areas.

15. With regard to article 28 of the draft law, we note the following problems:

a) The explanatory notes point out that the Analytical Document of the Justice System draws attention to the poor professionalism and lack of independence of the High Court in general. However, the solution provided by article 136 says that appointments shall be made by the President of the Republic upon proposals by the High Council of the Judiciary. The question arises, does the composition of the High Council of the Judiciary guarantee independence?

b) The explanatory notes (page 9), state that the proposal was designed to make the High Court into a career court. However, article 28 of the draft law does not reflect this proposal at all. If the High Court was to be a career court, all its members, notwithstanding the criteria, would come from the judiciary and not from among experienced lawyers. Moreover, the proposal does not clarify whether there will be a ratio between members coming from the judiciary and those coming from the community of experienced lawyers.

c) In paragraph 2 of article 136, does the term "professor of law" refer to the academic title or to being a member of teaching staff in law faculties?

d) The term "high public administration" is entirely obscure as to which bodies it refers to, since legislation in force contains no clear definition of this term.

e) Paragraphs 2 and 5 of this article contain a description of legal procedures for appointing judges. Such a repetition is redundant and re-wording is necessary.

16. Article 31 of the draft law which amends paragraph 4 of article 139, specifies that one of the causes for termination of the mandate are disciplinary violations. It would be logical to place disciplinary violations in paragraph 1 of this article since it lists the cases of termination of the mandate of judges of the High Court or High Administrative Court.

17. The provisions contained in article 32 of the draft law, adding article 139/a in the Constitution, are redundant as they are absorbed by article 139, paragraph 4, as amended.

18. Article 34 of the draft law states that the High Administrative Court has reviewing powers. However, article 27 of the draft law (article 135/2) reads that administrative adjudication takes place in two instances, in the first instance and the High Administrative Court. In their entirety, these two provisions eliminate adjudication in the appeals court, as the second instance, and they give the High Administrative Court reviewing powers only. According to these provisions, administrative adjudication concludes in the first instance. Does this mean that the first instance ruling shall be directly enforceable?

19. Article 40 of the draft law, amending article 147 of the Constitution, specifies the composition of the High Council of the Judiciary and the manner of appointing the members of the council. However, the Analytical Document of the Justice System identifies that the malfunctioning of the High Council of Justice is due to the fact that the majority of its members come from the judiciary, and that the existing constitutional and legal framework do not contain criteria for the screening of the Council members appointed by the Assembly. In general, it does not describe any accountability mechanism for the Council members[1]. The proposed amendments should have resolved these problems. As contained in article 40, the High Council of the Judiciary will be made up of 11 members, of whom six will be judges; five will be from advocates, teachers of law faculties and the Magistrate School, and civil society. Again, the

[1] Page 6 of the Explanatory Notes

criteria for selection of the five members are not defined. Hence, the proposal does not provide an optimal solution to the issues encountered so far.

On the other hand, it is unclear why two members should be proposed by the teaching staff of the law faculties, and one member from the non-magistrate teaching staff of the Magistrate School. It would have made sense to provide for the appointment of three members from the teaching staff of the law schools (including the Magistrates School), without stipulating such a division in the Constitution. Furthermore, in view of the existing numbers of the non-magistrate teaching staff in the Magistrate School (no more than five), indirectly the provision makes sure for one of them to sit on the High Council of Justice and again, indirectly, this member from the Magistrate School may be elected as the Chair of the Council.

Another shortcoming mentioned in the Analytical Document, is the appointment of members by the parliament by simple majority, which creates the possibility for the parliamentary majority to dictate the appointment[2]. The proposed wording, despite the stages in the voting, does not guarantee impartiality and does not eliminate the potential for the parliamentary majority to influence the appointment of members. This is evident in paragraph 3 of article 147, which reads that should a 3/5 majority vote fail in the first voting, a second voting is held, and should it also fail, the candidates listed by the Council of Appointments (in accordance with proposals from the relevant bodies) shall be considered as elected.

In view of the above, the proposals contained in the draft law, in our judgment, do not resolve the current problems. They attempt to reform the organization and operations of the High Council of Justice, starting with the name of the institution, its composition and titles of its members, but do not guarantee the independence and impartiality of the Council. Neither do they eliminate the conditions for the establishment of an enclosed corporate. Consequently, as proposed, the Council does not guarantee impartiality and independence in the governance of the judiciary.

[2] Page no. 6 of Explanatory Notes.

20. Article 41 of the draft law, which adds article 147/a, in its paragraph "e" reads that *the High Council of the Judiciary is responsible for managing and checking on the court administration*. This practically means that the High Council of the Judiciary shall be entrusted with the administration of the case management system in the courts, with running the statistical system of the judiciary, maintaining relations of the judiciary with the public and the media, managing the judiciary administration, etc. These responsibilities are currently held by the Ministry of Justice.

The question rises, can a collegial body attend to such duties? One of the reasons why the case management system or maintenance of statistics was entrusted to the Ministry of Justice was the need for an executive body to care for these systems. In addition, access to statistical information by the executive, directly informs policy making and long term strategies for the judiciary.

21. As concerns articles 41, 42, 43, 44, 45, 46, 47, 48, 49 of the draft law, in accordance with rules of the legislative technique, articles 147/a, 147/b, 147/c, 147/ç, 147/d, 147/dh, 147/e, 147/ë, 147/f can be added by way of a single article in the draft law.

22. Article 45 of the draft law, paragraph 3, reads that the post of the High Inspector of Justice can be held by judges or former judges with at least 20 years of experience as a judge. This requirement may seem at first as one of merit, but in practice it significantly narrows the scope for eligible candidates. This criterion automatically disqualifies all the judges trained in the Magistrates School (the first generation has only 15 years of experience).

Paragraph 7 of article 45, specifies that the candidates for appointment on the High Inspectorate of Justice, shall be subject to a thorough investigation of their wealth, integrity, and background. But who will carry out the investigation?

What is more, the provision states that these candidates will be selected respectively from the High Council of the Judiciary and the High Council of the Prosecution. In the event they do not collect a majority vote in the Assembly, the candidates ranked first shall be considered as elected. How shall the creation of a closed club be avoided? This question emerges since the

members of the Inspectorate will subsequently investigate disciplinary violations by and complaints against the members of the High Council of the Judiciary and the High Council of the Prosecution, and they will also initiate disciplinary procedures against those who nominated them. In any case, were they to be elected in the assembly by a qualified majority vote, these candidates would, at least in appearance, enjoy some degree of independence from those who nominated them.

23. Article 49 of the draft law, paragraph 2 of article 147/f to be added, reads that the Disciplinary Tribunal shall be composed of the Head of the Constitutional Court, Head of the High Court, Head of the High Administrative Court, the General Prosecutor, the Minister of Justice, the head of the National Chamber of Advocates, the most senior member of the Constitutional Court, the most senior member of the High Court, and the most senior member of the High Administrative Court. A similar composition applies to the Council of Appointments in the Justice System, stipulated in paragraph 3, of article 149/1 to be added.

According to this article, the Council of Appointments in the Justice System is composed of the Head of the Constitutional Court, Head of the High Court, Head of the High Administrative Court, Head of the High Council of the Judiciary, the General Prosecutor, the Head of the High Council of the Prosecution, the Minister of Justice, the Head of the National Chamber of Advocates, the most senior judge of the Constitutional Court, most senior judge of the High Court, most senior judge of the High Administrative Court.

As concerns the stipulation in paragraph 3 of article 149/1, with reference to "most senior judge of the court" be it the Constitutional Court, the High Court or the High Administrative Court, it must be clarified whether most senior refers to seniority in terms of profession or age.

24. Article 50 of the draft law, paragraph 4 of article 148 to be amended, states that *Prosecutors are appointed by the High Council of the Prosecution, upon the proposal of the High Council of the Prosecution [...]*. According to this provision, the proposal and appointment are vested in the same body. It should be examined whether it is a case of a typing mistake or whether it is meant for the same body to be responsible for both the proposal and appointment.

Should the latter be the case, the provision must be rephrased in accordance with the principle of the clarity of legal norms.

25. As regards articles 51, 52, 53 of the draft law, in accordance with the rules of the legislative technique, articles 148/a, 148/b and 148/c may be added by way of a single article in the draft law.

26. In relation to article 53 of the draft law, which provides for the addition of article 148/c:

a) This provision sets up the First Instance Anti-Corruption Court and the Appeals Anti-Corruption Court. However, as per article 27 of the draft law, which amends article 135, paragraph 1, these courts do not feature as parts of the judiciary. Should the wording of article 53 of the draft law be maintained as is, these courts must be listed in article 27 of the draft law.

b) Paragraph 4 stipulates that the *prosecutors on the Special Anticorruption Structure, must, among other things, pass the test on the investigation of their wealth and their background, and they should also be subject to periodic examinations of their financial accounts, as well as telecommunications on their part or on the part of their close relatives.* It is unclear who will carry out this investigation, what is meant by *examination of telecommunications* and who shall be considered as *close relatives*?

c) Paragraph 5 of this article, mentions the "National Bureau of Investigation". This body is mentioned in the Constitution for the first time. The role, position, composition, organization, and manner of operation of this body are therefore unclear.

27. As regards article 54 of the draft law, amending article 149 of the Constitution:

a) Paragraph 1 stipulates a 9 year term for the General Prosecution. We think that this term is not justified and is even incompatible with the provisions of article 148 as amended, according to which the Prosecution functions in accordance with the principle of decentralization.

b) Paragraph 2 contains the term "distinguished university" which is beyond any legal definition and as such it is bound to cause subjectivism in practice.

c) Paragraph 4, sub-paragraph "a", vests the General Prosecutor with the power to represent the prosecution in the Constitutional Court. However, article 26 of the draft law which amends article 134, does not mention the general Prosecutor among the petitioners who set in motion the Constitutional Court.

d) Paragraph 4, sub-paragraph "dh", stipulates that the *General Prosecutor is responsible for the institutional strategic planning; it reports before the public and the Parliament on the situation in the prosecution office and carries out other functions as prescribed by law.* We wish to bring to your attention that the same powers are vested in the High Council of the Prosecution in article 52 of the draft law, which adds paragraph 2 of article 148/b. Consequently, the two provisions should be revisited to avoid overlapping of powers.

In addition, we point out that the Constitution of the Republic of Albania uses the term "Assembly" and not "Parliament".

28. Article 55 of the draft law which provides for the addition of Article 149/a, in paragraph 3 stipulates that *upon the expiry of the 9 year term, the General Prosecutor is appointed as judge in the Appeals Court.* This provision is not in accordance with article 149 as amended, which stipulates that the General Prosecutor may be selected among experienced graduates from the Magistrates School, or among those who have at least completed post university studies of the first level. Thus, the General Prosecutor does not necessarily come from the community of judges. He/she may have graduated as a prosecutor from the Magistrates School, but may as well be a lawyer who happens to fulfill the Constitutional and legal criteria. It follows that in case the last two instances apply, none of the incumbents may hold the office of an appeals court judge, upon expiry of the term.

29. Article 57 of the draft law, which adds article 149/1, provides among other things that "*the Council of Appointments in the Justice System advises the Assembly and the President in relation to the appointments*". However, article 147/3 of the draft law, as formulated, provides

that “in case the said majority is not attained in the second voting, candidates ranked higher by the Council of Appointments shall be considered as appointed”. It follows that such a provision goes beyond advisory powers.

30. In relation to article 57 of the draft law, the numbering of which is erroneous, and which amends article 179, we wish to point out that:

a) Paragraph 5, stipulates that three members of the High Council of the Judiciary who are judges, and two who are not judges will initially be appointed for a three year term. The word “initially” conflicts with the provision of article 147/5, which stipulates that the members of the High Council of the Judiciary are not entitled to subsequent re-appointment.

b) Paragraph 6, stipulates that the *General Prosecutor remains in office until the appointment of the new General Prosecutor under this law. The outgoing General Prosecutor is appointed as judge in the Appeals Court of Tirana within 3 months from the day of his/her term expiry*. This provision conflicts with paragraph 1 of this article, which states that the term of the constitutional bodies which will exist following the entry into force of this law, shall expire according to the provisions of law no. 8417/1998 “Constitution of the Republic of Albania”, as amended. The General Prosecutor represents a constitutional body.

In addition, if we refer to the current General Prosecutor, before taking this office, he was a prosecutor and not a judge. Under these circumstances, he cannot be appointed a judge in the Appeals Court of Tirana.

31. In conclusion, regarding the text of the draft law in general, we suggest:

a) In accordance with the rules of the legislative technique, each time reference is made to constitutional provision, the actual paragraph should be mentioned, and the use of the term “point” should be avoided, since law no. 8417/1998 is divided into articles, paragraphs, and subparagraphs.

b) Overall, what stands out is the poor quality of the phrasing of the provisions and the wording of the articles. It should be kept in mind that the present law is not a simple one, but the fundamental law of the state. The provisions in the Constitution should be clear, well formulared and in accordance with the principle of clarity of the legal norm. The need for these changes may, indeed, be pressing, but on the other side, the phrasing and wording require great diligence, in order to endure the test of time.

About the Annex entitled "Transitional assessment of the qualifications of the judges and prosecutors"

1. In technical terms, we note that the Annex entitled "Transitional asssessment of the qualifications of judges and prosecutors" is mentioned in article 179/1 of the Constitution. However, in none of the following constitutional provisions is it stated that this annex is made an integral part of law no. 8417/1998.

2. In general, this annex describes a heavily complicated procedure with numerous structures entaiings a lack of clarity in the provisions contained therein. In view of the reasons for adding this annex, as mentioned from the beginning in article 1, it is necessary for the provisions to be re-formulated in accordance with the prinicple of the clarity of legal norms, which may even require a restructuring of the provisions thereof. In particular, the terminology of the annex, should be carefully reviewed to do away with a number of subjective and abstract terms, which may lead to abusive application in practice. By way of ilustration, article 3 pargrapph 14 uses the collocation "protection of the highest level".

3. In this annex, article 2, refers to the Ineternational Monitoring Mission, *as a way of cooperation among the European Commission, the United States of America, other international organizations, and bilateral international assistance. This Mission is granted the right to appoint international observers in both instances of the Independent Qualifications Commission. It is chaired and acts though the European Commission, which coordinates international assistance.*

The following should be kept in mind in connection with this provision:

a) The fact that the Consitution will stipulate the possibility of the European Commission, the United States of America, other international organizations, and bilateral international assistance to observe or participate in the process of assessing the transitional qualifications of judges and prosecutors does no tmean that this mechanism will automatically function. The European Commission, the United States of America, and other international organizations have their own internal rules and procedures with regard to assistance in a given field. Such provision cannot charge them with the obligation to be part of the process. Under these circumstances, this provision risks to remain unenforceable in practice. The more so, since article 2 contains the obligation for international observers to posses similar qualifications with the commissioners on the Independent Qualifications Commission. In addition, among the entities to participate in the International Monitoring Mission, it is not possible to decide which entity shall chair the mission.

b) In paragraph 2 of article 2 and further on in this Annex, when reference is made to the international observers, it is stipulated that they have the right to "examine". This term is not only unclear; it also fails to clarify the roles in the decision-making processes following an eventual "examination".

c) In relation to the provision under article 2, but also under article 9, paragraph 2, which read that *the testing is carried out under the oversight of the European Commission,* we wish to draw your attention to the fact that the process of assessing the qualifications of the incumbents is the responsibility of domestic institutions. As Albania aspires to EU membership, we need to demonstrate that our institutions are fully capable of carrying out such responsibilities.

4. With regard to article 3 of the Annex:

a) It is unclear what is ment by the terms "comissioners of the first instance" and "commisioners of the second instace" in paragraph 1. If reference is made to commissioners selected from the first instance and appeals courts respectively, then this should be made clear by the wording used in the text.

b) Specificaton of salary and other benefits for commissioners, stipulated in paragraph 8 of this article, is not something that must necessarily be contained in the Constitution. The Consitution is a document which containes the basic rules and fundamental principles, and not a document of such details as contained in this Annex.

5. Article 7, paragraph 2, establishes that the *assessment of the performance of judges focuses on their adjudication capacity, organizational capabilities, written decisions, orders and decrees, the ethics and commitment to the judicial values {...}*. Here we wish to point out that judges do not issue decrees.

Thank you for your understanding!

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